

**Unofficial Draft Copy**

As of: October 17, 2008 (3:46pm)

LC0342

\*\*\*\* Bill No. \*\*\*\*

Introduced By \*\*\*\*\*

By Request of the \*\*\*\*\*

A Bill for an Act entitled: "An Act prohibiting certain kickbacks and conflicts of interest for health care providers; defining conflict of interest for health care providers; including conflict of interest as unprofessional conduct for health care providers; requiring licensing boards to share investigation reports with the department of public health and human services;."

Be it enacted by the Legislature of the State of Montana:

NEW SECTION.    **Section 1. Kickbacks prohibited -- limited exceptions.** (1) Except as provided in subsection (2), an employment contract, employment agreement, or contract-for-hire agreement with a health care provider, signed or renewed after [the effective date of this act], may not:

    (a) require exclusive referrals or an expected volume of referrals between parties; or

    (b) base remuneration or rebates on exclusive referrals or an expected volume of referrals.

(2) Exceptions to the remuneration or rebate provisions of subsection (1)(b) include:

    (a) written contracts or agreements entered into after an open-bidding process;

(b) community-based fair market value payments to a health care provider, including bonuses that do not relate to a specific volume or percentage of business based on referrals, to the extent allowed under the antikickback statute, 42 U.S.C. 1320a-7b by:

(i) an employer, including a health care facility as defined in 50-5-101; or

(ii) a group practice of two or more health care providers that has filed as a partnership, professional corporation, or limited liability company under Title 35 and that jointly:

(A) uses office space, facilities, equipment, and personnel;

(B) bills in the name of the group practice; and

(C) treats receipts for services as receipts of the group practice;

(c) amounts paid by a vendor to a purchasing agent for a health care provider or health care facility, defined under 50-5-101, under a written purchasing agreement or contract that specifies a fixed amount or a fixed percentage as provided in 42 U.S.C. 1320a-7(b)(3)(C);

(d) waivers, reductions, or amounts paid as provided under 42 U.S.C. 1320a-7b(b)(3)(D through H) and involving a federally qualified health care center, managed care organization, health maintenance organization, pharmacy, rural health clinic, a health care provider participating in a risk-sharing agreement, or other individual or entity covered by 42 U.S.C. 1320a-7b(b)(3)(D through H); and

(e) written fair market value remuneration or compensation

agreements involving health care facilities and health care providers that qualify for exceptions under 42 U.S.C. 1395nn(e) (1) through (8).

**NEW SECTION. Section 2. Enforcement -- confidentiality -- definitions.** (1) (a) Upon receiving notification of a determination of unprofessional conduct by a Title 37 health care licensing board under 37-1-316(19) or Title 37 program under 37-1-410, the department shall investigate to determine if the health care provider subject to the unprofessional conduct determination had an employment contract, employment agreement, or contract-for-hire arrangement with a health care facility licensed under Title 50 that violated [section 1].

(b) If the department determines that the employment contract, employment agreement, or contract-for-hire arrangement violates [section 1], the provisions of chapter 5, parts 1 and 2, of this title apply.

(2) Until the department makes a determination as provided under subsection (1)(b), the department shall maintain the confidentiality of investigation records obtained from a health care licensing board and from its own investigation. The portions of an employment contract or agreement that violate state law do not have protection under privacy statutes.

(3) For the purposes of this section, "health care provider" means an individual licensed or certified under Title 37, chapters 3 and 4, 6 through 17, 20 through 28, and 34 through 36.

**Section 3.** Section 37-1-135, MCA, is amended to read:

**"37-1-135. Licensing investigation and review -- record access -- record sharing.** (1) Any person, firm, corporation, or association that performs background reviews, complaint investigations, or peer reviews pursuant to an agreement or contract with a state professional or occupational licensing board shall make available to the board and the legislative auditor, upon request, any and all records or other information gathered or compiled during the course of the background review, complaint investigation, or peer review.

(2) Notwithstanding other confidentiality requirements, a board or, for a program, the department shall report its findings that a licensee under chapters 3 and 4, 6 through 17, 20 through 28, and 34 through 36, has engaged in unprofessional conduct under 37-1-316(19) or 37-1-140(1)(m) and shall provide any related investigation reports and records to the department of public health and human services for investigation as provided under [section 2]."

{Internal References to 37-1-135: None.}

**Section 4.** Section 37-1-302, MCA, is amended to read:

**"37-1-302. Definitions.** (1) As used in this part, the following definitions apply:

(1)(a) "Board" means a licensing board created under Title 2, chapter 15, that regulates a profession or occupation and that is administratively attached to the department as provided in

2-15-121.

~~(2)~~(b) "Complaint" means a written allegation filed with a board that, if true, warrants an injunction, disciplinary action against a licensee, or denial of an application submitted by a license applicant.

~~(3)~~(c) "Department" means the department of labor and industry.

~~(4)~~(d) "Inspection" means the periodic examination of premises, equipment, or procedures or of a practitioner by the department to determine whether the practitioner's profession or occupation is being conducted in a manner consistent with the public health, safety, and welfare.

~~(5)~~(e) "Investigation" means the inquiry, analysis, audit, or other pursuit of information by the department, with respect to a written complaint or other information before a board, that is carried out for the purpose of determining:

~~(a)~~(i) whether a person has violated a provision of law justifying discipline against the person;

~~(b)~~(ii) the status of compliance with a stipulation or order of the board;

~~(c)~~(iii) whether a license should be granted, denied, or conditionally issued; or

~~(d)~~(iv) whether a board should seek an injunction.

~~(6)~~(f) "License" means permission granted under a chapter of this title to engage in or practice at a specific level in a profession or occupation, regardless of the specific term used for the permission, including permit, certificate, recognition,

or registration.

~~(7)~~(g) "Profession" or "occupation" means a profession or occupation regulated by a board.

(2) For the purposes of this part and 37-1-410, the term "conflict of interest" refers to a recurring set of conditions in which a health care provider exercises professional judgment concerning a patient's welfare when making a referral that is unduly influenced directly or indirectly by an investment, employment, or contractual interest that is the beneficiary of the referral."

{ Internal References to 37-1-302:  
37-1-138x            37-35-301\*x }

**Section 5.** Section 37-1-316, MCA, is amended to read:

**"37-1-316. Unprofessional conduct.** The following is unprofessional conduct for a licensee or license applicant governed by this chapter:

(1) conviction, including conviction following a plea of nolo contendere, of a crime relating to or committed during the course of the person's practice or involving violence, use or sale of drugs, fraud, deceit, or theft, whether or not an appeal is pending;

(2) permitting, aiding, abetting, or conspiring with a person to violate or circumvent a law relating to licensure or certification;

(3) fraud, misrepresentation, deception, or concealment of a material fact in applying for or assisting in securing a

license or license renewal or in taking an examination required for licensure;

(4) signing or issuing, in the licensee's professional capacity, a document or statement that the licensee knows or reasonably ought to know contains a false or misleading statement;

(5) a misleading, deceptive, false, or fraudulent advertisement or other representation in the conduct of the profession or occupation;

(6) offering, giving, or promising anything of value or benefit to a federal, state, or local government employee or official for the purpose of influencing the employee or official to circumvent a federal, state, or local law, rule, or ordinance governing the licensee's profession or occupation;

(7) denial, suspension, revocation, probation, fine, or other license restriction or discipline against a licensee by a state, province, territory, or Indian tribal government or the federal government if the action is not on appeal, under judicial review, or has been satisfied.

(8) failure to comply with a term, condition, or limitation of a license by final order of a board;

(9) revealing confidential information obtained as the result of a professional relationship without the prior consent of the recipient of services, except as authorized or required by law;

(10) addiction to or dependency on a habit-forming drug or controlled substance as defined in Title 50, chapter 32, as a

result of illegal use of the drug or controlled substance;

(11) use of a habit-forming drug or controlled substance as defined in Title 50, chapter 32, to the extent that the use impairs the user physically or mentally;

(12) having a physical or mental disability that renders the licensee or license applicant unable to practice the profession or occupation with reasonable skill and safety;

(13) engaging in conduct in the course of one's practice while suffering from a contagious or infectious disease involving serious risk to public health or without taking adequate precautions, including but not limited to informed consent, protective gear, or cessation of practice;

(14) misappropriating property or funds from a client or workplace or failing to comply with a board rule regarding the accounting and distribution of a client's property or funds;

(15) interference with an investigation or disciplinary proceeding by willful misrepresentation of facts, by the use of threats or harassment against or inducement to a client or witness to prevent them from providing evidence in a disciplinary proceeding or other legal action, or by use of threats or harassment against or inducement to a person to prevent or attempt to prevent a disciplinary proceeding or other legal action from being filed, prosecuted, or completed;

(16) assisting in the unlicensed practice of a profession or occupation or allowing another person or organization to practice or offer to practice by use of the licensee's license;

(17) failing to report the institution of or final action on



a malpractice action, including a final decision on appeal, against the licensee or of an action against the licensee by a:

- (a) peer review committee;
- (b) professional association; or
- (c) local, state, federal, territorial, provincial, or Indian tribal government;

(18) conduct that does not meet the generally accepted standards of practice. A certified copy of a malpractice judgment against the licensee or license applicant or of a tort judgment in an action involving an act or omission occurring during the scope and course of the practice is conclusive evidence of but is not needed to prove conduct that does not meet generally accepted standards.

(19) for health care practitioners licensed under chapters 3 and 4, 6 through 17, 20 through 28, and 34 through 36, a determination of a conflict of interest or violation of [section 1]."

{ Internal References to 37-1-316:

37-1-319 x	37-1-320 x	37-3-348 x	37-35-301*x
37-35-301 x	37-35-301* x	50-20-307 x }	

**Section 6.** Section 37-1-410, MCA, is amended to read:

**"37-1-410. Unprofessional conduct.** (1) The following is unprofessional conduct for a licensee or license applicant in a profession or occupation governed by this chapter:

- (a) being convicted, including a conviction following a plea of nolo contendere and regardless of a pending appeal, of a crime relating to or committed during the course of practicing

the person's profession or occupation or involving violence, the use or sale of drugs, fraud, deceit, or theft;

(b) permitting, aiding, abetting, or conspiring with a person to violate or circumvent a law relating to licensure or certification;

(c) committing fraud, misrepresentation, deception, or concealment of a material fact in applying for or assisting in securing a license or license renewal or in taking an examination required for licensure;

(d) signing or issuing, in the licensee's professional capacity, a document or statement that the licensee knows or reasonably ought to know contains a false or misleading statement;

(e) making a misleading, deceptive, false, or fraudulent advertisement or other representation in the conduct of the profession or occupation;

(f) offering, giving, or promising anything of value or benefit to a federal, state, or local government employee or official for the purpose of influencing the employee or official to circumvent a federal, state, or local law, rule, or ordinance governing the licensee's profession or occupation;

(g) receiving a denial, suspension, revocation, probation, fine, or other license restriction or discipline against a licensee by a state, province, territory, or Indian tribal government or the federal government if the action is not on appeal or under judicial review or has been satisfied.

(h) failing to comply with a term, condition, or limitation

of a license by final order of the department;

(i) having a physical or mental disability that renders the licensee or license applicant unable to practice the profession or occupation with reasonable skill and safety;

(j) misappropriating property or funds from a client or workplace or failing to comply with the department's rule regarding the accounting and distribution of a client's property or funds;

(k) interfering with an investigation or disciplinary proceeding by willful misrepresentation of facts, failure to respond to department inquiries regarding a complaint against the licensee or license applicant, or the use of threats or harassment against or inducement to a client or witness to prevent them from providing evidence in a disciplinary proceeding or other legal action or use of threats or harassment against or inducement to a person to prevent or attempt to prevent a disciplinary proceeding or other legal action from being filed, prosecuted, or completed;

(l) assisting in the unlicensed practice of a profession or occupation or allowing another person or organization to practice or offer to practice the profession or occupation by use of the licensee's license.

(m) engaging in a conflict of interest, as defined in 37-1-302, or a violation of [section 1].

(2) For the purposes of Title 37, chapters 72 and 73, and Title 50, chapters 74 and 76, the following additional practices are considered unprofessional conduct:

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(a) addiction to or dependency on alcohol, an illegal drug, or a dangerous drug, as defined in Title 50, chapter 32;

(b) use of alcohol, an illegal drug, or a dangerous drug, as defined in Title 50, chapter 32, to the extent that the use impairs the user physically or mentally;

(c) conduct that does not meet generally accepted standards of practice. A certified copy of a judgment against the licensee or license applicant or of a tort judgment in an action involving an act or omission occurring within the scope of practice and the course of the practice is considered conclusive evidence of but is not needed to prove conduct that does not meet generally accepted standards."

{ Internal References to 37-1-410:  
37-3-104 x 37-35-103 x }

## NEW SECTION. Section 7. {standard} Codification

**instruction.** (1) [Section 1] is intended to be codified as an integral part of Title 37, chapter 2, and the provisions of Title 37, chapter 2, apply to [section 1].

(2) [Section 2] is intended to be codified as an integral part of Title 50, chapter 5, part 1, and the provisions of Title 50, chapter 5, part 1, apply to [section 2].

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